United States

Circuit Court of Appeals

For the Ninth Circuit

MARY BRODERICK, Administratrix with the will annexed of the Estate of Eugene H. Ware, deceased,
Appellant,

v.

THE TRAVELERS INSURANCE COMPANY, a corporation, and THE TRAVELERS INDEMNITY COMPANY, a corporation,
Appellees.

No. 11901

Brief of Appellant

On Appeal from the District Court of the United States for the District of Idaho, Northern Division

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IDAHO STATUTES INVOLVED

Risks to be written by licensed agents residing within state. Idaho Codes Annotated 40-901

Resident agents must countersign all policies: "and shall receive full commission when the premium is paid." 40-902

Policy must contain entire terms of agreement. 40-1107

Rebating in any manner, particularly agent's commission, prohibited. Section 40-1107

Where policy does not conform to statutes, disregarded and provisions of statutes govern. 40-1201

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STATEMENT OF THE CASE

This action is being prosecuted by Mary Broderick vs. the Appellees to recover commissions on account of insurance policies written for the construction of what is known as Farragut Naval Training Station in Kootenai County, near Coeur d'Alene, Idaho. The policies are particularly described in the complaint and it is alleged that Eugene H. Ware was a citizen and resident of Kootenai County, Idaho, and the defendants were corporations of the State of Connecticut, and the amount involved exceeds $3,000.00. Eugene H. Ware and E. H. Ware are the same person and duly qualified and licensed resident insurance agent of Idaho doing business as Eugene H. Ware Company and that the defendants caused him to be

licensed as their resident agent in the State of Idaho. (P. 2 and 3.)

About the first day of October, 1936, they entered into a written contract with him to represent them in the territory of Coeur d'Alene and vicinity. (P. 16.) The contract provided that they would pay commissions as set forth therein, and part 1, sub-division "A" provides: "on workmen's compensation and employers' liability premiums, except underground coal mining risk, ten percent." (P. 17.) Some other forms of insurance are also provided for but the workmen's compensation is the principal thing. The contract provided that Ware should countersign policies of insurance (P. 19), and thereafter the company wrote Mr. Ware certain letters and sent him form statements. These are attached as exhibits "A-1 to A-9, inclusive." (P. 22 to 30.) Exhibit "A" is the original contract signed by the parties. They caused Mr. Ware and employees in his office to be designated as their attorneys in fact to sign all instruments. (Exhibit "B.")

It was alleged in the complaint that, while he was such agent, the company submitted to him for signing and he did sign the contract covering workmen's compensation for Walter Butler Company upon which $295,265.00 was paid as an estimated premium (P. 9) and that a large amount of additional compensation was pending and that the total premiums due on this policy would amount to over $900,000.00 (P. 12) and by reason of these facts more than $90,000.00 became due the plaintiff as commissions on the insurance

premiums and, that by the laws of the State of Idaho, the defendant companies were required to have a resident agent sign all policies and the full commission on the premium was to be paid them for such signing.

They allege that they didn't know the full amount paid by Walter Butler Company and requested an accounting. To this, a motion to dismiss was filed and the case heretofore came to this Court upon an order of the District Judge and sustained the motion to dismiss. This Court reversed the decision of the lower Court, holding that, under the facts, the complaint was supported (*Ware v. Travelers Insurance Company,* 150 Fed. 2nd, 463).

Thereafter the defendants answered and in the answer again set up a claim that no cause of action was stated. (The answer appears, pages 35 to 50.) By the answer they admitted that the premiums on the policies at the standard rates amounted to $1,200,211.06 for compensation, $74,460.10 on another policy, $13,-768.80 on still another policy and on indemnity policy a premium of $6,168.46, or a grand total of premiums of $1,294,608.42 on the policies written in connection with the construction by the Walter Butler Company in Idaho.

They then allege that they had made a special arrangement whereby the premiums which they were to get were reduced to but $236,813.40 for the compensation and on the other policies an additional sum, making a total of $246,124.55 and made claim that

they were required to make this kind of policy carrying this rate.

To this answer a reply was filed admitting various items and denying the others and alleging that the amount set forth by them as a grand total, $1,294,608.42 was actually collected and taxes paid thereon. (Reply appears fully, pages 51 to 54.) A trial amendment to the answer was filed when the case was called for hearing which appears pages 55 and 56. Upon the hearing a stipulation was entered into relative to the premiums on the policy and appears on pages 59 to 65, inclusive. In it, it was stipulated that the companies made a return to the Industrial Accident Board of premiums collected and paid taxes in the sum of $449,556.01 and on February 26th, 1943, they reported to the director of insurance and paid 3% tax due on accident, health and personal liability and workmen's compensation in the sum of $558,994.21 for the year 1942 and that for the years 1942, 1943 and 1944 they made returns of premiums of $727,524.30, less $439,417.90 and a tax was paid semi-annually to the Industrial Accident Board and annually to the Bureau of Insurance upon the basis of the amount of premiums for the period reported and that no refund of tax was made by the Industrial Accident Board or by the Bureau of Insurance for the State of Idaho on account of the return of premiums reported by the defendant, nor was any action ever taken by the Travelers Insurance Company to recover any taxes paid. It was further admitted in paragraph six, pages 63

and 64, that the defendants were actually paid $694,-823.87 on account of the policies in controversy and that they returned to Walter Butler Company the sum of $440,985.33.

Upon this state of the record the case came on for trial and oral and documentary evidence was taken.

In the meantime Eugene H. Ware had died and his executrix, Mary S. Ware, had been substituted as plaintiff but she had also died and an administrator with the Will annexed of his estate was substituted in lieu of the Executrix.

The evidence taken on the hearing consisted, first, of the introduction and acceptance of the stipulation which was copied into the record and appears on pages 96 to 104.

It is proper to state here that in the beginning appellant furnishing an abbreviated record in which the matters appearing at other places and immaterial matters were eliminated but counsel insisted that the entire record should go up as it was and the record is encumbered by having many matters appear therein at various times. Illustration of this is the fact that the stipulation appears as filed in the Court (pages 58 to 65, inclusive). It appears again as part of the evidence on the trial. (P. 96 to 104.)

Attached to the complaint were various notices and letters, etc., which were admitted but many of them were also again introduced in evidence but are not

printed, appearing in the original exhibits directed to be sent up by order of the Court, thus making a record very long and cumbersome for the simple matters that are really involved therein.

The defendants set up by their answer a special affirmative defense in which they claim in the fourth defense, pages 48 to 50, that they made a supplemental written contract with Eugene H. Ware to countersign policies for $5.00 a month "for handling a small amount of countersigning." This special affirmative defense the plaintiff denied and alleged that this agreement was not made in connection with any business developed by the plaintiff's contract and, if so construed, it was void under the laws of the State of Idaho. This so-called written contract is Exhibit 1 to Answer (P. 50) and shows that it was a letter written by somebody to Eugene H. Ware in which they had stated, in substance, that they would pay him $5.00 a month "for a small amount of their countersigning service."

They also claim that the contract had been changed by a circular letter of June 1st, 1940, appearing as Exhibit "A-2" to the complaint, which reads as follows:

> "You are hereby informed that, until otherwise advised, on risks written on the retrospective or special commission basis, on risks or portions of risks *which are in states other than indicated in the territory described in your agreement* and on bonds involving execution or countersigning by another agent, providing your agency agreement includes surety lines, and commissions which

you may retain out of the premiums paid to the company, will be fixed on the basis of the individual risk, anything in your agency agreement to the contrary, not-withstanding."

The exhibits show returns made by the defendant company showing the large amount of money collected. The first was Exhibit 1 which was the contract policy itself and did not include various written exhibits which were then attached to it, neither did it include the certificate of the Secretary which the Secretary had placed on the policy (before delivering the same) but which was not a part of the policy (P. 105). This policy nowhere shows on its face or in any other manner than by subsequent endorsements placed thereon some time after it was written that any other than the standard rate was being charged. This becomes material because of the fact that the defendant undertook to say and the witness Peterson did testify at one time, positively, that it did show this, but after a lengthy cross-examination and demand that he point out where it appeared on the policy, had to admit that it was not there and that there was not a thing on the contract policy as written that showed any so-called war insurance rating endorsement on the policy when it was issued. (P. 146.)

The plaintiff also introduced in evidence the defendant's return to the Industrial Accident Board for the six months period, July 1, 1942, to December 31, 1942, of the collection of premiums in that time by the defendant company, $449,556.01. This is Exhibit No. 2. The plaintiff then introduced No. 3 show-

ing the defendant's report to the Industrial Accident Board for the six months period, January 1st, 1943, ending June 30, 1943, all net premiums collected for workmen's compensation of $171,492.14. In other words, it showed the premiums collected at the standard rate. Exhibit No. 4 was also marked and introduced in evidence for identification and showed earned premiums.

The defendant then produced as a witness Oscar W. Nelson, who had been engaged in the business of insurance in Coeur d'Alene and vicinity for 23 years. He testified that the regular full commission on workmen's compensation insurance in the State of Idaho and in the vicinity of Coeur d'Alene was ten percent (P. 109, 110), his answer being as follows:

> "The usual practice is the standard rate of commission, ten percent to the local agent."

Thereupon the plaintiff introduced in evidence various instruments, being Exhibits "A" to "R," inclusive, and rested. These exhibits show the returns made by the defendant company showing the large amount of money collected.

The defendant then introduced as its principal witness, George E. Peterson, Secretary, whose testimony commences on page 130 and runs to 232, and commences again on page 246 and runs to page 255. He testified in substance that he had charge of the departments and knew of the matters involved and particularly the so-called 'war rating plan.'

He testified that prior to the adoption of this plan all government agencies securing workmen's compensation or public liability insurance were required by Act of Congress to get four bids and let a contract to the lower bidder. (P. 139.) This is as provided for by law (Sec. 5, title 41, USCA; Title 34, Sec. 561, USCA and Title 34, Sec. 571, USCA) requiring this and prohibiting it being waived excepting to certain particular things.

The whole trouble seems to be that non-stock companies were getting the business and this was a scheme for big companies to get it (P. 135) and he then testified, that by this scheme, they eliminated commissions. (P. 136.)

He acted as one of the commission handling this matter for the government and at the same time was the secretary of the defendant companies doing the business for the defendants. (P. 136, 137, 138.) He was in Washington at the time of this proposal and apparently contacted the officials about it. (P. 138-139.) By this contract it provided that the government itself should pay a fee to a person called 'Insurance advisor' and eliminated the commission of the agent. (P. 141.)

He testified positively that each of the three policies he examined, which were the three in controversy, carried the 'War Projects Rating Endorsement' (P. 146). He testified the 'war rating plan' was on the policy in the beginning. (P. 148.)

He then, through a lengthy discourse, explained how they arrived at the amount under this policy—first, by eliminating the ten percent which we contend was the agent's commission, and then making other deductions according to the loss under the risk.

The Court, after hearing the witness testify, made this statement:

> "here the testimony seems to show that the companies, before they started to do business, felt that they must have an agent to countersign these policies, and still there seems to be a scheme here to evade the law." (P. 163.)

This was with reference to paying an agent for countersigning. He testified, however, in regard to this countersigning as follows:

> Q. Subsequently to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for counter signature?
>
> A. They were.
>
> Q. *That is out-of-state business?*
>
> A. *Yes, sir.* (P. 164.)

He then testified that if the company paid commissions they could not have done business. (P. 165.)

Much of his testimony is taken up with opposition to mutual companies. He again repeated elimination of the agent's commission was the major thing in the scheme. (P. 167.)

He then testified that under this procedure the contractor paid the insurance advisor a fee of $10,586.61. This was charged back to the government, of course. (P. 171.)

He testified it was their general practice to have their policies countersigned in the local states (P. 173) but said the final adjustment was down to a premium of $246,126.56. He then testified they had held up a settlement with the government because of this case. (P. 176.)

Pages 175 to 182, inclusive, he testified to the letters Exhibits "A" to "O" as being the entire correspondence with the advisor. Not only that, but the man who pretended to be the advisor's representative on the project, was also on the pay roll of the Walter Butler Company.

> "A. He was on the pay roll of the Acme Brokerage Company—probably both." (P. 177.)

The letters show very little between the Acme Brokerage Company and the insurance company.

He then testified (P. 189) that the two defendant companies were associated in business, occupied the same building, with the same people working for them, and that in this case the insurance company wrote the policy and the indemnity company put up the bond and that he didn't know why they did it that way. (P. 189, 190.) He then testified that as to two accounts put in evidence, that one simply brought the

account up to a further date and that the first one was simply included in the last. (P. 191.) He testified he didn't know of any difference it would make.

When the copy of the insurance policy, Exhibit No. 8, was furnished, the Secretary added a certificate to it, that it was in accordance with certain things. *This was not offered by us.* However, on cross-examination, the witness admitted that without that certificate there was nothing on the endorsement of the policy that showed (3016) which was the so-called 'war projects rating plan.'

"Q. Not a thing?"

"A. No, sir." (P. 195.)

He testified they prepared the policies in Hartford and sent them to Mr. Ware to have the policies countersigned and returned to them and, at the same time, have him execute bonds and see that the bonds were properly filed with the officials of the state and that this was done. (P. 196-197.)

The evidence shows without conflict that they paid taxes to the State of Idaho in insurance premiums collected on these policies amounting to more than $694,823.87. He testified he was on the committee before the war and acted on it from that time until after the war was completed (P. 198-199) and that he held the position of Secretary of the defendant companies during that time. (P. 199.) He then explained that a few of the mutuals and a few of the stock companies

got together and organized this plan dealing with the companies. (P. 200.) He also testified at another time his company wrote $97,000,000.00 of business with the Government.

Defendants' Exhibit No. 7, which is a letter the defendants' agent wrote Mr. Ware which they claim is the contract for countersigning everything at $5.00 a month, says:

> "for handling a small amount of countersigning that will be necessary from time to time."

It then says that "the payment for the month of October will be forwarded as of *November* 1*st* by the Auditor, and a like amount *each month thereafter* until otherwise advised." It will thus be seen that by their own letter they were paying for a small amount of countersigning only which we contend did not apply to business originating in Ware's territory but to small passing matters passing through the office coming from some other section of the country entirely and also the letter provides the payments were being made the month after the work was done and for the preceding month and not in advance. (The letter appears P. 220.) The last check Ware got was dated May 11th. The policies countersigned were dated at the home office May 18th, secured by Ware about May 29, Ex. 21, and countersigned and returned on that date and not a cent was ever paid Ware *after the policies in question were countersigned by him.*

Peterson, in testifying in answer to a question by the Court, said:

"He countersigned policies other than these.

THE COURT: He countersigned other policies? A. Yes.

THE COURT: He was paid five dollars per month. Was he paid anything additional for signing these policies? A. No, sir." (P. 223.)

Peterson again tried to testify that the 'war rating' was referred to in the policy itself but, upon cross-examination, he testified:

"Q. The endorsement is not specified in the policy?

A. It was not the practice of the company to do that.

Q. Why was it the practice to put in a part and not the balance?

A. No part except as they appeared as necessary.

Q. The rule was that you didn't put in the policy, the contract itself, any endorsements that you were attaching to it?

A. We put the endorsements in that constituted a part of it. I have shown that they were attached.

Q. I asked you if you could find in the contract portion of the policy itself?

A. *No; it is not in the contract portion.*" (P. 226-227.)

On page 208 he gave another reason.

"Q. What was the practice in respect to each of these using these forms in inserting the number of the comprehensive plan endorsement?

A. *There was no space provided. It cannot appear on the policy.*

Turning to Exhibit No. 8, which is now in evidence, we find there is ample space for putting on dozens of these endorsements. Again on page 204 he testified:

"MR. WHITLA: This endorsement was not on the original policy as sent out?

A. *It is not the practice.*

Q. MR. WHITLA: That endorsement referring to the number of the endorsement was not on the original?

A. *Not noted on the policy.* Neither was the other matter there."

The defendants' witness Jordon testified he resided at Spokane; was in the employ of the claims division at that place and that the company had an office on the project servicing the claims right there and that they had two men, Paul Shedler and George Sonickson, and the clerical staff that was necessary acting as investigators on the project and looking after claims and medical care for the men. (P. 232-233.) That, in cooperation with Walter Butler Con-

struction Company they kept a hospital on the ground and employed three doctors and kept a full force there looking after the business and that it was a joint operation between the defendants and Butler Construction Company. (P. 237 to 238.)

Evelyn Thomas Michaelson testified that she was the Evelyn Thomas who signed the policies for E. H. Ware and that the endorsement 3016 was not on the policy at that time. (P. 243.) She looked it over and, on redirect examination said they checked the policy to see what it covered because Mr. Ware was trying to contact the contractor to get the insurance business prior to the time the policy came in, and that the 'war projects rating endorsement' was not on it. (P. 245.)

George Peterson was again called and, from page 246 to 255, testified with relation to how mutual insurance companies were run, the commissions they paid and salaries, etc.

J. G. Adams called on behalf of the plaintiff, in rebuttal testified (pages 255 to 258) that he had been local agent and home office agent and branch manager of various companies and was familiar with their operations and testified to the amount of payment by them for their agents in this vicinity.

Oscar Nelson recalled (pages 258 to 265) testified about his qualifications, the companies he represented which included a general agency for the Idaho Compensation Company, and that they paid seventeen and

one-half percent commission. This was put in to meet the fact that the defendants had placed in evidence the Articles of Incorporation of the Idaho Compensation Company to show that they did have local competition and inferring that they didn't pay adequate commission rates but the evidence showed they were exceeding those of the defendants.

Thereafter the Court rendered its opinion in which he held:

> "that it might be said the war rating plan was not authorized in Idaho and that it was set up with the thought of avoiding payments of commission." (P. 75.)

He found definitely that the statute was made a part of the plaintiffs' contract; he found that the insurance company, in all of its actions, was subject to the regulation of the laws of the State and that they established the matters of public policy of the State and *could not be departed from by the parties. "I agree that they cannot be waived, and that the public policy cannot be departed from."* (P. 76.)

He found that the full commission referred to in the statute to be paid was so indefinite that it did not provide for any commission and that the agent was not given the specific right to any particular commission.

He also found that the contract was countersigned in Idaho "so I think it can safely be said, at least, the contract was written and placed within the State."

He then made his Findings of Fact in which he found various things to which exception had been taken, including the fact that the statute providing for full commissions did not give any definite standard of measurement. That the $5.00 a month paid to Mr. Ware for countersigning a small amount of business prohibited him from recovery and entered judgment in favor of the defendants.

There is very little conflict in the evidence but much surplusage.

From the judgment in favor of the defendant this appeal is taken.

SALARIED AGENTS PROHIBITED BY THE STATUTE

The statute everywhere provides that it is only one who gets a *commission* who can counter-sign. The counter-signatures cannot be by a salaried agent. To do this is a violation of the law. This was one of the things that was directly in issue in *Osborn vs. Oslin* and is referred to in that opinion. 29 Fed. Supp. 71, Subhead 10 of the Syllabus, and again in the opinion on Page 82, where the Court said:

> "The provision for counter-signatures needs little discussion. Such a requirement is quite common throughout the United States. The present satutory provision that the signature of a commission rather than a salaried agent shall be affixed to the policy is imposed as a safeguard to make certain that the commission agent, whose cooperation in the enforcement of the insurance statutes is desired, shall have knowledge of the issuance of policies and of his right to share in the commissions and in the subsequent activities under the contract."

Therefore, this alleged contract for a $5.00 a month salary is void and not a defense in this case.

SPECIFICATIONS OF ERROR

The Appellant specifies the following errors upon which Appellant will rely upon the appeal:

I.

The Court erred in his opinion in holding that Ware had a separate agreement to act as counter-signing agent for the reason that said alleged agreement was limited to a small amount of counter-signing business, and if construed to effect business such as that involved herein is against the public policy of the State of Idaho and void.

II.

The Court erred in holding that as a matter of law, the Plaintiff's right is wholly dependent on the statute for the reason that the contract established his agency, his right to act as their agent and their appointment of him as such agent, set the amount of the commissions and the law of the State required Defendants to pay the full commissions when policy counter-signed by him.

III.

The Court erred in holding that it was no basis upon which to arrive at the amount that would be due Ware for commission for the reason that the term "full of commission" means the full commission which is generally paid, and the Defendants, by their contract,

having agreed to pay 10% commission on workmen's compensation policies established the same as the full commission and there is no showing by them that any other sum or lessor sum whatever was the commissions on any kind of workmen's compensation policy.

IV.

The Court erred in making Findings of Fact No. 6, for the reason that the War Projects Rating Plan referred to as the basis for this findings, specifically provides that where the plan is not permitted by the laws of the State, it shall not be used, and the evidence is that the plan could not be used in Idaho, and for the further reason that by the statute of the United States the plan is not permitted and is an attempt by the Defendant company in association with others to violate the statutes of the United States, and also a scheme promulgated by the Defendants and others for the purpose of preventing certain insurance writers from obtaining the business contrary to the laws of the United States and the State of Idaho; that the Court specifically found in his opinion and the evidence shows that the contract was written and the same was placed in the State of Idaho and by said findings the Court makes no findings that this plan was permissable under the laws of the State of Idaho.

V.

The Court erred in making Findings of Fact No. 8, for the reason that the record shows that Eugene H.

Ware was the designated agent of the company of the Defendants and had authority to write insurance under his contract with them and counter-sign policies for them, and it was under the written contract with Defendants that this policy was counter-signed and the Court has found that the laws of the State of Idaho become a part of that contract and with the contract govern the transaction.

VI.

The Court erred in making Findings of Fact No. 9, in that said purported letter written by the Defendants was limited in its scope, did not pretend to take in such business as the business in controversy and is shown not to include this business and that after the policies in controversy were written, no sum whatever was ever paid Eugene H. Ware or anyone on his behalf for the counter-signing of said policies and that he received no sum whatsoever for counter-signing the policies in controversy and is entitled to the full commission therefore.

VII.

The Court erred in making Findings of Fact No. 11, for the reason that the policy did not become a valid policy until it was counter-signed by Eugene H. Ware and it required his signature to make the policy a binding agreement so that it could be filed with the proper authorities of the State of Idaho and enforced. It was made and placed in Idaho on Idaho property.

VIII.

The Court erred in making Findings No. 13, for the reason that the same is not within the issues of this case.

IX.

The Court erred in making Conclusions of Law No. 2, for the reason that the law does apply to the facts of this case and that the term "full commission" has been sustained by the Supreme Court of the United States.

X.

The Court erred in Conclusions of Law No. 3, for the reason that Eugene H. Ware was paid no sum whatever for counter-signing the policies in controversy and no agreement was made covering such policies.

XI.

The Court erred in making Findings of Fact No. 4, for the reason that the undisputed facts show that the Plaintiff was entitled to recover in this case for the full commission on the amount of the premiums paid.

XII.

The Court erred in entering a decree herein in

favor of the Defendants and against the Plaintiff dismissing this case for the reason that the record shows that the Defendants contracted to pay the Plaintiff 10% commission on all workmen's compensation policies and various other rates upon other classes of cases and that the law provides that when an agent counter-signs the policy, he is entitled to the full commission and the term "full commission" means the ordinary commission therefore; and when a rate has been fixed it will be taken as the full commission contemplated by the statute and said commission having been fixed and the undisputed evidence showing what the commission is, the Plaintiff was entitled to recover the amount thereof.

XIII.

The Court erred in not holding that the matter of full commission being sufficiently definite to entitle the Plaintiff to recover. It was involved on the appeal of the Circuit Court of Appeals and decided in favor of the Plaintiff under the decision of *Holmes vs. Springfield Fire and Marine Insurance Co.,* 311 U. S. 606—85 L. Ed. 384, and the question that full commission was not sufficient to state a cause of action was raised by the defendants in that case, fully argued by the Court, sustained, and is the law of the case.

XIV.

The Court erred in not holding and finding that the Plaintiff was entitled to 10% upon the workmen's

compensation policy involved and the other designated amounts on the other policies involved.

SPECIFICATIONS WILL BE GROUPED AND ARGUED TOGETHER.

ARGUMENT AND AUTHORITIES

The assignments of error will be grouped under heads and many of them can be presented together. SPECIFICATIONS OF ERROR 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, and 14.

First, it is our contention that the matter of the complaint alleging that we were entitled to the full commission and the decision of the Court sustaining this complaint as against the argument of the appelles of the former appeal establishes the law of the case. In that case as in this they took the position that the claim of 'full commission' meant nothing and established no rule to go by and that therefore, there was no pleading of any fact authorizing a recovery. If, under the facts pleaded in this case, the claim that we were entitled to the full commission as stated by the contract which the defendants had themselves drawn establishing the commission to be paid at ten percent, does not establish what the full commission is and our right to recover that amount, together with the evidence adduced at the trial which was not contradicted, then the defendants might have some ground to rely on. We think the decision in *Osborn v. Oslin,* (310 U. S. 53—84 L. Ed. 1074) is a complete brief on this. Particularly is the following applicable to this phase of the case:

> "When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts."

In this case when the question of construing the law as to what is meant by 'full commission' is under consideration, the fact that this same provision of law is inserted in the laws of numerous states—Mississippi provides "and receive the full commission when the premium is paid." Colorado provides "and receive the full commission thereon when the premium is paid." Montana provides "and receive the full commission, etc., when the premium is paid." We do not have the laws of all states at hand but most of them provide the 'full commission' or the 'usual and customary commission' and the law makers unquestionably intended it to be the same.

This matter was fully argued by counsel for appellants beginning on page 23 of their brief in this Court and continuing to page 27, so the matter was squarely presented to this Court before. Not only that, but this Court called attention to the Supreme Court's decision in *Holmes v. Springfield Fire & Marine Ins. Co.* (311 U. S. 606—85 L. Ed. 384), in which this identical provision from the Montana law was in controversy.

In that case the insurance company brought an action to prevent the enforcement of the collection of

the premiums on insurance placed outside of the state on which the premiums were approximately $865,000.00. The policies had been sent to Montana and there countersigned. The insurance company refused to pay the full commission and offered about one-half of it. The State Auditor asked for the opinion of the Attorney General on the validity of the statute and he rendered the opinion. In bringing the action to enjoin the State Auditor, the plaintiffs set up the opinion of the Attorney General in full as a basis of securing the injunction and it was on the construction placed on this identical clause in the Montana statute that the cause was decided. After detailing the facts, the Attorney General ruled:

> "Therefore, it is my opinion that the State Auditor must insist that the full commission, in accordance with the definition herein, should be paid the counter-signing agent in all cases; *prior stipulations or contracts by the company or local agent not-withstanding.*"

In his opinion, set forth in the pleadings, in that case the Attorney General made this claim as to the phrase 'full commission.'

> "I find that 'full' means, as defined by Webster's dictionary, 'complete, entire, without abatement, mature, perfect'—a definition that has been approved in 85 Ill. 194, 195.
>
> " 'Commission' means percentage of allowance made to a factor or agent transacting the business of the company, *the whole of it.* Then it is clearly apparent that the legislature intended that the resident Montana agent *should receive the same*

commission for countersigning an insurance contract as he would receive for the same business if he secured it himself."

The insurance companies claimed this opinion was wrong and that the term 'full commission' was meaningless as the District Judge has held in this case. The three-man Court sustained their contention but, on appeal, the United States Supreme Court had no difficulty in finding that it did establish a basis and held the lower Court's action erroneous and reversed the case.

The opinion of the Attorney General of Montana which was sustained is terse, direct, conclusive, and means, in substance, that the party countersigning gets all of the commission the same as if he had written the policy and that no prior stipulations or contract between the company can be set up to interfere with it. In this case the appelles designated Ware as their agent but they wrote the contract. They specified ten percent on all workmen's compensation. *They never set any different amount.* The testimony adduced was that the full commission was construed ten percent generally on this class of business. Had they desired to disprove this, they had the opportunity to do so. They did not do so, and, as the Supreme Court of the United States had no difficulty in finding that this was a proper basis for a cause of action, we are at a loss to find where there is any reason for the Court not applying the rule provided for by the statute.

(282 U. S., 251—75 L. Ed. 324), was the early case upon the right to enforce such statutes. There the insurance companies took advantage of the act to be relieved from an excessive claim. In that case it limited the rate to a reasonable sum and the Court held:

> "The statute under review does not prescribe a schedule of rates or point out the basis for determination of reasonable rates; it leaves with each company the primary right and duty of deciding upon rates to be demanded. But it inhibits payment to any agent, irrespective of the worth of his services and without regard to any contract with him, of anything in excess of what may be actually paid to another agent."

They then hold that under that law, the lowest sum paid to any agent would be taken as the reasonable rate and no other agent could collect in excess of that.

The Idaho statute, set forth on page 71 of the record, in the Court's opinion, provides that when there is a licensed broker "the countersigning agent shall receive a commission of not less than five percent of the premium." This would indicate the very least under any circumstance that could be paid would be five percent and that was when two participated and evidently divided the fee.

Not only that, but after all of these matters had been up the Supreme Court of the United States was again called upon to pass upon the general construction of these laws. *Prudential Insurance Company v.*

Benjamin (328 U. S., 404—90 L. Ed. 1342), where they say:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.
>
> *"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations."*

Robertson v. California (328 U. S. 440—90 L. Ed., 1366), is to the same effect. These decisions amount to the fact that the Supreme Court of the United States considers that these laws are all now approved. The fact that in *Holmes v. Springfield F. & M. Insurance Co.* the Court found so little in the respondents con-

tention that 'full commission' was meaningless, that it decided the case in this terse opinion:

> "October 14th, 1940 (*procurium*) the judgment is reversed."
>
> *Osburn v. Ozlin* (310 U. S., 53—48 L. Ed. 1074—60 S. Ct. 758), "rehearing denied. November 12, 1940."

The brevity of this decision and its decisiveness was such that it cannot be construed in any other way than the United States Supreme Court held, that they had little patience with such attempts to evade the law as was involved in the Montana cases and as involved in this one.

Hoopeston Canning Co. v. Cullen 318 U. S. 319—87 L. Ed. 777, shows the reach of such statutes as here involved.

The contract with Ware set forth on sub-division 8, page 19 (T), specifically provides:

> "the agent is authorized to countersign policies of insurance, renewal receipts, certificates, and endorsements pertaining to the lines of insurance covered by this contract, unless otherwise advised."

The statutes covering this is as in the opinion of the Court, page 71 and again in the Findings of Fact, page 88, Finding 10, the material part of the statute is as follows:

> "A resident agent shall countersign all policies so issued (except policies of life insurance) *and shall receive the full commission when the premium is paid* * * *"

Having created Ware the agent to countersign policies, this section of the statute is unquestionably read into the contract and becomes a part of it.

Home Building & Loan Ass'n v. Blaisdell (290 U. S., 398—70 L. Ed. 413), where the United States Supreme Court says:

> "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.'"

Wright v. Union Central Life Insurance Co. (304 U. S., 502—83 L. Ed. 1490), where the U. S. Supreme Court said:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

Dighton v. First Exchange National Bank (33 Idaho, 273—192 Pac. 832):

> "That law became a part of the contract and was and is binding on the appellant as if it had been expressly agreed that the grantors named in

the deed might remove from the state and thus keep respondent's mortgage in force."

The following authorities sustain the ruling:

Farnsworth v. Haigland, 300 Fed. 993.

"A party to a contract embodies the statute of the state therein."

F. & M. Bank v. Federal Reserve Bank (263 U. S., 649—67 L. Ed. 1157);

Farley v. Board of Education (162 Pac. 797).

The Court in the opinion recognized this and, in substance, held that such was the fact but said (P. 73):

"The Court will not consider whether there is a right of recovery for the countersigning service rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936, *as that is not before* the Court."

Again (P. 74):

"There is nothing in the evidence to indicate that Ware was to receive any special commission for approving and countersigning the so-called home office policies. There is no contract in existence here between Ware and the defendants for a stipulated commission.

Page 75 the Court said:

"In a proper action it might be said that the war rating plan, under which the insurance involved in this action was written, was not permissible under the Statute of Idaho. It seems without question that the plan was set up with the

thought in mind of avoiding the payment of commissions, *but regardless of that fact the Court is unable, after reading the statute into and making it a part of the contract, which provides that he shall have the full commission when the premium is paid, determine what, if any, commission could be allowed when no commission is agreed upon and no commission is paid.*

The agency contract expressly provides in part 1, page 17:

> "On workmen's compensation and employers' liability premiums, except underground coal mining risks, 10 percent."

That establishes what the full premium on this class of business in Idaho is and the testimony was definite and undisputed on that question.

The contract then states (Paragraph 8, Page 19):

> "The agent is authorized to countersign Policies of Insurance * * *"

Therefore reading the statute quoted into it, it would say 'and shall receive the full commission for so doing.'

Now, the Court holds that the statutes should be read into this contract and, if so, it makes a perfect agreement between the parties. Taken in view of the fact that this is the exact position taken by the Attorney General of Montana which the insurance companies there contested, and that his opinion was the gist of the action against Holmes, it shows that the Supreme

Court of the United States had no difficulty in solving that question.

The reason for exhibit A2 to the Answer explains this notice fully. It will be noticed it is dated June 1, 1940. *Osborne v. Ozlin,* 310 U. S. 53 was decided April 20, 1940. By that decision, the law of the various states that agents were entitled to collect commissions for counter-signing was definitely upheld. It shows upon its face that the acting secretary was notifying the agents of a condition which might arise where they wrote insurance going into some other state and which had to be countersigned in such other state so that the company would not be liable for double commissions under this decision. Reading the letter we notice that this particular statement conclusively bears out that agreement:

> "on risks or portions of risks *which are in States other than that indicated in the territory described in your agency agreement.*"

In other words they were not going to be caught where they had to pay double agents commission. Eliminate this provision from the notice and it would bear out the appellees condition, but insert it and it limits the former statement definitely *to risks or portions of risks which are in states other than that indicated in the territory described in your agency agreement.* If it is to be construed now as counsel contends for, then this limitation is wholly without any affect. Counsel now wants to remove from their own unilateral writing, which they prepared themselves and which Ware

had nothing to do with, the most material part of that notice. To do this would be to violate all rules of construction.

First, every word and sentence in a contract must be given affect.

Second, if there is any ambiguity regarding the contract it is construed *against the party making it.*

Under the first heading a judgment is construed so as to give affect to every sentence and word in it.

> *Salt Lake City v. Salt Lake W. & E. Co.* 174 Pac. 1134;
>
> *State v. District Court,* 233 Pac. 957;
>
> *Boundary County v. Martin Woldson,* 144 Fed. 2nd 17;
>
> *Wright v. Village of Wilder,* 63 Idaho, 122—117 Pac. 2nd 1002.

> "Generally, the various provisions of a contract or statute must be so construed, if possible, as to give force and affect to every part thereof."

> *Stone v. Bradshaw,* 64 Idaho, 152—128 Pac. 2nd 844.

That contracts will be construed against the party drawing them where there is any question of ambiguity whatever or any question of the construction, is well settled.

Ries v. Pacific F. & P. Co. 50 Idaho 140—294 Pac. 336, where the Court said:

> "The contract as made was prepared and submitted by appellant, and the language of the whole thereof being ambiguous or uncertain, the rule is that the contract should be construed most strongly against the party preparing it or employing the words concerning which doubt arises."

The following cases clearly establish this rule.

Hauter v. Coeur d'Alene, etc. M. Co. 39 Idaho 621, on rehearing 625—228 Pac. 259 where the Court said:

> "The insurer fixes those terms, and it is a well settled rule of construction that the conditions of a contract will be construed most strongly against the pary who uses them."

But that was intended to notify the agent that, under the decision of *Osburn v. Ozlin,* if any risks were written by him that applied in another state, then they would have to re-arrange his commission as then they would have to pay commissions in other states as well. To read it otherwise would mean that they were making a rather uncertain statement completely ambiguous and unintelligible so that no one could understand what it meant, but reading it in the light of *Osburn v. Ozlin,* it is plain as can be and was limited to 'on risks or portions of risks which are in states other than that indicated in the territory described in your agency agreement.' It was not intended to say and did not say that 'on contracts within the territory embraced in his agency agreement, viz., Coeur d'Alene and vi-

cinity where the Farragut Naval Training Station was situated that this would not be paid' and it did not so state.

ASSIGNMENT OF ERRORS 1, 5, 7, 10 AND 14

SPECIFICATIONS OF ERRORS 1, 5, 6, 10

The Court erred in holding, deciding and finding that the letter, Exhibit 7, constituted any contract covering any part of the insurance involved in this proceeding.

The defendants pleaded as a special defense, the letter, Exhibit 7, written to the plaintiff, defendants Exhibit 1 appearing on pages 50 and 51 of the transcript. The reply specifically denied that this had anything whatever to do with the matters in controversy and that it was never written for the purpose of waiving any fees on any business in the territory covered by Ware's agency contract. (Paragraph 3 of reply, pages 53 and 54.) They were specifically put on notice that this was only a small amount of out-of-state business in which, for some reason, the contract should be countersigned in Idaho, but nothing developed in the territory covered by Ware's contract, so that there was no question about this and defendants themselves proved this on the trial, and their Secretary, George Peterson, testified to that fact. (P. 164.)

> "Q. Subsequently to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for counter-signature? A. They were.
>
> Q. *That is on out-of-state business?* A. Yes, sir."

So it is at once apparent that this proposal had nothing to do with anything in controversy.

Again, the reading of this letter indicates that very thing. This letter says:

> "Following Mr. Gilbert's explanation of our proposed arrangement to reimburse the Idaho agency *for a small amount of counter-signing* that will be necessary from time to time, I recommended to our home office that your agency be recognized in this matter."

It will be noticed that it referred to 'handling a small amount of counter-signing that would be necessary from time to time.' At no place does it indicate that it was any business arising in Ware's territory or having any connection therewith.

Again, the payments for this were to commence November 1st. 'Payment for the month of October will be forwarded to you as of November 1st by the Auditor and a like amount each month thereafter until otherwise advised.'

It will be noticed on this small amount of counter-signing he was to be paid *the succeeding month for the counter-signing of the preceding month.*

Mr. Ware was dead. His testimony on that cannot be secured. The only other person who knew of that was their agent Gilbert. He was not produced at the trial and Peterson testified it was on some counter-signing of out-of-state business. If there were a few

automobiles had drifted into Idaho on which renewal policies should be issued, for the benefit of finance companies in the east and they desired Ware to countersign them, which was no business he had anything to do with or covered anything only a business agency contract, and paid him a small fee for services which are of such small amount that the bookkeeping embraced in the ordinary entry would have been worth more than a policy they had and right to do so. On the other hand, this is construed as it is now claimed that it was, namely, to be a method of evading the payment of the statutory commission which was illegal and not permissible and couldn't be set up as a defense.

The Court, in its opinion, admitted that generally such contracts would be invalid and said (P. 76):

> "In viewing this statute I am taking the position that the Insurance Company in all its operations is subject to the regulations of the state as to rates, agency contracts and terms of the policy, and when the legislature has acted upon these matters they become public policies of the State and can not be departed from by the parties. I agree that they cannot be waived, and that the public policy cannot be departed from."

This is unquestionably the law and they cannot do indirectly what they cannot do directly. If that is so, therefore any contract that they intended to make and avoid the payments of the commission which the statute provided for, would itself be a violation of that public policy and therefore void.

Whitfield v. Aetna Life Insurance Company (205 U. S., 487—51 L. Ed. 897), where the Court says:

> "An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. *If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt.*"

The contract is mandatory and obligatory alike on the insurance company and the assured. Its object was to prohibit and annul such stipulations in policy and *it could not be waived or precluded by any form of contract or by any device whatever. William V. Travelers Insurance Company* (169 NW, 609, on page 610):

> "When the legislature declares, as it has by this section in question, the public policy of the state to be that which had heretofore been subject to contract between the parties shall thereafter be by certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties thereto, *the statutory provisions step in and control the legal and mutual rights and obligations rather than the provisions of any contract the parties may attempt to make varying therefrom.*

Boston Ice Co. v. Boston & Maine R. R. Co. (45 L. R. A. ns 835), where the Court held:

> "That, as corporations, the plaintiffs in interest have only such rights of contract as the state permits; that, as the result of legislation, the business of insurance is no longer a private right, but a matter of public concern, a franchise subject to regulation by the state for the public good."

Mutual Insurance Company v. Huntsberry (156 Pac. 327);

Reeves v. National Fire Insurance Co. (170 NW, 575).

These laws are as much a part of the policy of insurance as though written therein, and are controlling certain other provisions conflicting with those actually contained in the policies.

Brakestone v. Appleton Mutual Fire Ins. Co. (135 NW, 853);

Keller v. Travelers Insurance Co. (58 Mo. App. 857—561).

Cited with approval by United States Supreme Court and in that they said:

"this was, in effect, the legislative declaration of the public policy of the state."

The public policy, of course, is established by the statutes of the state.

Sanborn v. Pentland (35 Idaho, 639—208 Pac. 401):

"The public policy of the state in this instance is determined by the statute itself."

Boise Payette Co. v. School Dist. 1 (46 Idaho, 403—268 Pac. 26):

"The public policy of a state is to be found in the constitution and statutes without regard to all provisions thereof bearing on the particular subject under consideration."

McFall v. Arkoosh (37 Idaho, 243—215 Pac. 979):

> "Public policy, it must be born in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of the parties, but for the public."

It must be born in mind that rule is never set up or relied on under an illegal contract, but defendants are the ones that do that very thing, if this contract is construed as they contend. That being so, 'he who relies upon the illegality, is the one who is denied relief!'

McConnon v. Holden (35 Idaho, 75—204 Pac. 656) on page 82 where the Court said:

> "It has been held that when a plaintiff can maintain his cause of action without the aid of an illegal act or an illegal agreement, he will be entitled to recover."

Municipal Sec. Corp. v. Buhl H. Dist. (35 Idaho, 377—208 Pac. 232), the Court said:

> "In order that illegality may prevent a recovery upon a contract, it must inhere in the contract relied upon."

If a resolution appointing the fiscal agent is illegal, as it probably was, it could not have been enforced, *nor could it be set up as a defense in any action brought upon a contract to rapurchase.* On rehearing the Court said:

> "Where a contract contains illegal provisions, and also a separable legal agreement, the latter

> will be enforced *if no necessity exists for reliance by the party seeking to enforce it upon any of the illegal provisions thereof.* * * *

"In this regard the contract was illegal and the Hanchett Bond Company was charged with the knowledge of the law, as well as the Commissioners of the District.

"Respondents in this action, however, in seeking to enforce only one provision of the contract which is as follows: * * * (stating provision)

> "The provision in the contract quoted is separable from the remainder of the contract, and may be enforced without necessity of reliance upon any illegal provision thereof."

Thus the general rule is that where the Plaintiff is not seeking to enforce any illegal provision but the Defendant is asking the Court to construe a unilateral contract prepared by it so as to make the contract illegal in order to escape liability and set up such illegal contract as a defense, the Court will not consider it a defense, or relieve the Defendant from liability on such a claim.

When a part of the divisible question or contract is *ultra vires* or illegal, but not *mala in se,* and the remainder is legal, the latter may be sustained and enforced unless it appears from the construction of the whole question or contract that it would not have been made though apart it is *ultra vires* or illegal.

(*Ill. T. & S. Bank v. State of Arkansas,* 78 Fed. 281 "C. C. A.")—"On the other hand the true rule is, and ought to be, the converse of that proposition." It is that when a part of the divisible contract is *ultra vires,* without any *mala in se* nor *malum prohibita,* the remainder may be enforced unless it appears from a construction of the whole contract that it would not have been made independent of the part which is void.

> *McPhee & McGinnity Co. v. A. P. R. Co.* (158 Fed. 5)
>
> "When a part of the divisible ordinance or statute and another part is without, the power of the body which enacts it, the form is valid and may be enforced although the latter is void, unless it appears from a construction of the entire ordinance or statute that would not have been enacted if apart it is void."

In this case, therefore, the defendants have sought to construe this contract is making it illegal and claimed that it annulled the provisions of the statute, they are barred from setting it up.

Again, one other thing is conclusive, and that is that where defendants' own agent wrote the notice which they are now trying to construe in a manner different from what it says on its face and put a new construction on it, it is illegal and contrary to what plaintiff sought by showing the true contract and contrary to their own Secretary's evidence, it certainly will be presumed that where they did not produce the witness who wrote it, his testimony would be adverse to them.

What has been said as to assignment of error Number 6 referring to construction of contract apply equally under these assignments as to the construction of the Defendant's Exhibit 7. Exhibit 7 does not say what counsel contends for it and is not and was never intended as a proposition for Ware to countersign everything Defendants submitted to him. This again, is not a bilateral contract. It is a unilateral writing sent by the Defendant to Ware. It did not purport to say that you will counersign for *all* policies for us at $5.00 a month. It is couched in very indefinite language and says a *small amount of counter-signing.* It did not say that any of the provisions in the contract creating Ware an agent in Idaho or as to any business within his territory were to be waived. This contract does not purport to say that Ware was to countersign policies which any other person should write within Ware's territory or by appellee, but referred to out-of-state business only. Defendant's evidence shows that conclusively.

Peterson, P. 164.

> Q. Subsequent to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for counter-signature? A. They were. Q. *That is out-of-state business?* A. Yes, sir.

As far as the evidence shows, nothing but out-of-state business was submitted to Ware for countersigning. Nothing that was within Idaho or in his territory. There was only a small amount of this. In

other words, if some automobile finance corporation had policies on cars that had come into the State of Idaho and wanted to renew them to protect their finance, the company writing them would send the policies to Ware to be counter-signed. It was never intended to be a general counter-signing signature. If it was, why limit it? The fact that it was limited itself means that the party who prepared it knew it was *not* to be a general counter-signing agreement. It was never intended as a general counter-signing agreement. If it had been, it was void under the statutes of Idaho and the Court so found. You cannot evade a rule of public policy by making a contract to circumvent it. Again this was a special defense. The Plaintiff did not bring this into the case *but the Defendants did.* They had to rely on proving an invalid contract and when they did, they had no right to rely thereon. The rule is that the party setting up and relying on an illegal contract is the one who is barred and that it does not effect the other party whatever.

Why did the appellee not introduce the testimony of the witness who wrote this letter if anything other than what the appellant claims was understood? They knew of our claim on this. The Plaintiff specifically plead her claim and set up in Paragraph 3 of the reply, Page 53, in regard to this alleged letter:

> "was ever written for the purpose of waiving the fees on any business developed in the territory covered by Plaintiff's contract with the Defendant and deny that it had any reference to business

written within the territory served by the Plaintiff or included in his contract whatsoever, etc."

We then alleged that if it was so construed it was null and void and was in controvention of the statutes of Idaho. The Defendants and they alone had the only living witness to this controversy. We only know what Mr. Ware had told us and which exactly bears out the statement of their own secretary Peterson. The fact that they had this witness accessible, who was an agent of theirs and who handled this transaction, and did not produce him, certainly brings them within the rule that failure to produce such witness under these circumstances raises a presumption that his testimony would be against them. The rule is that where the evidence is within the possession of the party alleging the fact or is under his control, that the burden rests upon him to produce it, and failure to do so raises a presumption that if produced, it would be against him.

The agent that wrote the letter was their agent. They did not produce him or show what he intended and the presumption is that, therefore, that would have been unfavorable. This has always been the law of Idaho.

It is generally followed:

Garret v. Neitzel, 48 Idaho 727-285 Pac. 472, where the Court said:

"When evidence tends to prove a material fact imposing liability on a party, and he can produce evidence rebutting the case made against him, if

it is not founded on fact, but refuses to do so, it must be presumed that the evidence if produced would operate its prejudice and support an advisory *especially where one charged with suspicious or apparent dishonorable conduct has an opportunity to explain it away and fails to do so.*"

Bone v. Hayes 99 Pac. 172 Cal.

"In determining whether the evidence supports findings below, the Supreme Court like the Trial Court, must be guided by rules of law governing the effect of the production or withholding of particular evidence."

In the opinion the Court lays down the rule:

"It is a well settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not found on fact and he refuses to produce such evidence the presumption rises that the evidence, if produced, would operate to his prejudice and support the case of his adversary." (Citing many cases.) * * *

"Silence, under such circumstances," says the Court of Appeals of Maryland in *Keller v. Gill,* 92 Md. 190, 48 Alt. 69, "is little less than a formal confession of guilt and a Court of equity cannot be expected to say that the charges are unfounded or that the evidence is untrue, when there is nothing in the record to refute either, and when the parties charged with fraud have failed to repel it by their own testimony."

Sorenson v. Kribs, 161 Pac. 405 Ore.

"When a fact is peculiarly within the knowledge

of a party, he must, if necessary, furnish the evidence thereof."

At. S. F. R. R. Co. v. Rogers 113, Pac. 805 N. M.
"Where a negative condition lies peculiarly within the knowledge of the other party the averment of such condition is taken as true unless disproved by such other party."

Applied to the facts at bar, this is very fitting. Here we alleged that this letter did not apply to contracts such as the one involved. The evidence of their own secretary Peterson showed that the only thing he knew of was out-of-state business. The contract said "a small amount of counter-signing" and they did not meet the issue or prove anything to the contrary. The presumption therefore, is against them, and having in no manner met this issue of their affirmative defense it was error to construe an ambiguous contract as has been done.

Jossiffee v. Northern Pac. R. Co. 100 Pac. 977 (Wash.)

"Where it is necessary to make a character of proof which, under the circumstances, is exclusively within the knowledge of one or the other of the parties, the burden of proof is on the party in possession of such knowledge."

That is particularly fitting here as here the burden of proof was on Defendants in the first place as it was an affirmative defense. This rule has always been sustained by the Federal Courts.

Selma, Rome & Dalton R. R. Co. v. U. S. 136 U. S. 560; 35 L. Ed. 266.

"In order to prevent this, it has been established, as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."

Graves v. United States 150 U. S. 118, 37 L. Ed. 120.

"The rule even in criminal cases is if the party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

Runkle v. Burnham, 153 U. S. 216, 37 L. Ed. 694.

"The Doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice," was expressly adopted in the case of *Clifton v. U. S.* 45 U. S. 4 How. 242.

Jones v. Steinle et al. 15 S. W. 2nd. 164.

"The failure of proponent of a Will to produce or account for such other attesting witnesses, in addition to the one testifying, raises presumption that the other witnesses, if produced, would testify that the Will was not signed by them in the presence of the testator."

These matters are particularly strong in this case.

1st. Because the party with whom the transaction was had is dead and his testimony cannot be produced.

2nd. Defendants agent wrote it and he couched the contract in indefinite terms and certainly they cannot ask for it to be construed in their favor but under the rule of law elsewhere cited, the agreement is construed against the party who draws it.

ASSIGNMENT OF ERROR NO. 3, 9, 10, 11, 12, AND 13.

These all relate to the Court's holding that there was no basis for finding an accounting due. The statute specifically says: (Section 40-902.)

> "A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid."

This is also in the statutes in numerous other states and so the statute that was in force in *Holmes v. Springfield Fire & Marine Insurance Company, supra.,* the intention of all of the statutes is unquestionably the same. Some phrase it in a little different manner until a recent uniform law was brought out for the purpose of complying with the McCarran act and most of them have said the same as Idaho, namely—"full commission." Others said "usual commission." Others said "customary commission" and various other phrases were used. If we assume the Court's position is correct in stating an exact amount, then all these decisions have been for nought because as the decision of the United States Supreme Court was rendered as no commission was provided for. The Court's contention that, because it didn't state an exact amount that was to be payable, never could be collected, is so far afield that it would seem that all of the decisions on this question being decided under various statutes, it has practically covered the field.

In *O'Gorman & Young v. Hartford Fire Insurance Co.* (282 U. S. 251), it was "a reasonable amount."

In *Osburn v. Ozlin* it was "not less than one-half the customary commission." If the Court is right, then the Ozlin case should be reversed because there was no amount specified; *Holmes v. Insurance Company* is set aside because there was nothing specified in that. But that is not all. Since these cases have been decided, the matter has been in Court several times in addition and, at all times, has been sustained, which, in our opinion in the case, the fact that the Courts have settled this question.

> *Palmetto Fire Insurance v. Conn.* (9 Fed. 2nd, 202—204)

In that case the Federal Court brushed aside the contentions of the company and said:

> "In other words, it cannot accept the benefits of the rights and privileges of doing an insurance business in Ohio and reject the conditions imposed by statute."

Chrysler Sales Corp. v. Smith (9 Fed., 2nd, 666) where the Court again sustained the state laws.

Chrysler Sales Corp. v. Spencer (9 Fed. 2nd, 674), where the Federal Court again had no trouble in arriving at a conclusion in the case.

> *Prudential Life Insurance Co. v. Benjamin* (328 U. S. 404);
>
> *California v. Robinson* (328 U. S. 462).

It will be noted that in the statute all the way through it provides the agent must be paid a commission. Pay-

ment of a small stipend of $5.00 per month is not and never was commission. This was clearly a contravention of the law which would seem to need no authorities. The word commission means "percentage." *Gray v. Stearn* (149 Pac. 26, page 29),

> "The same work defines the word 'commission' as used in commercial law, as follows: The recompense or reward of an agent, factor, broker or bailee, when the same is calculated as a percentage on the amount of his transaction or on the profit to the principal."

Kelly, Mause & Co. v. Sibley (137 Fed. 586),

> "It is insisted, however, that these contracts are not contracts of sale, but contracts having agency only. This contention is predicated chiefly upon the use of the word 'commission.' Undoubtedly that word is usually employed to mean 'compensation allowed agents,' factors, executors, trustees, receivers, and other persons managing the affairs of others in recompense for their service."

This is the general definition of 'commission,' and where was any commission ever paid Ware? Nothing of the kind was ever done.

There is another thing about this, and that is that Ware was hired for $5.00 a month to countersign 'a small amount of business.' The evidence in this case is positively that he received no sum for signing these agreements.

There is another very important thing in this case and that is the fact that the witness Peterson, not on one occasion but on numerous occasion, testified that the entire plan of the policy was built up on the theory that they would not pay any commissions. The witness Peterson testified that prior to the innauguration of this plan they had to follow the statute and get four different insurance carriers to make a bid and it always went to the lowest bidder (P. 134).

> "They had to get four bids from four different carriers without distinction as to the qualifications of those carriers, and it was necessary to assign it to the lowest bidder, and it was apparent that in order to make available all of the insurance facilities to the United States—this was recognized by the War Department, first—." Objection sustained.

Again on page 135 he answered:

> "A. It was on the lowest bid basis, and it would all go to the non-stock companies."

He then testified (P. 136):

> Q. What was eliminated to make that possible?
>
> A. The matter of paying commissions in connection with the premium, which was developed under the plan.

Then to show what the premium was, they were required to figure on the basis of the standard rate but they took ninety percent of it, having eliminated the ten percent that went to agents commission:

"and the sum of all these various things, that becomes the final premium under the plan, subject, however, always to the maximum of ninety percent of the standard premium."

(P. 150.) The so-called plan which the witness Peterson and others promulgated was introduced in evidence as Exhibit 18. This plan specified on its face that it is not to be used in states where the laws of the state prohibit such things.

SPECIFICATIONS OF ERROR 2, 6, 4

Again the witness Peterson testified that it would have been impossible to have written this type of contract if any commission would have been paid (P. 165). After they got this plan working, they apparently did a big business. The witness testified to their business amounting to $97,000,000.00. (P. 133.)

The statutes of the state prohibits the writing of policies unless commission is paid and therefore the agreement to do this made the practice absolutely illegal in Idaho.

Again, the policy contract does not show on its face it was written on any retrospective basis nor is there any signed endorsement on the face of the policy referring to any retrospective showing. The statutes of Idaho, Sec. 40-1107, Idaho Code, provides:

> "No insurance company, association or society, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay directly or indirectly, as inducement to insurance or in connection therewith, on any risk in this state, now or hereafter to be written, any rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon; nor shall any such company, association or society, agent, collector or broker, personally or otherwise, offer, promise, allow, give, set off or pay, directly or indirectly as inducement to such insurance, or in connection therewith, any earnings, profit, dividends or other benefit, founded, arising, accruing or to accrue on such insur-

> ance or therefrom, or any other valuable consideration as inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance."

This is of the utmost importance because after a lengthy cross-examination it was finally admitted that the war rating plan was neither on this policy referred to therein by endorsement or otherwise when it was issued. There was nothing on the face of the policy that provided for the rebating of any premium. There was nothing on the face of the policy that suggested the agent's commission was not going to be paid in full.

While the statute makes it illegal to do this, Sec. 40-1201 provides:

> "POLICIES NOT CONFORMING TO STANDARDS.—No Company or agent shall issue or deliver in this state any policy which conflicts with any provision of this act. A policy issued in violation of this act shall be held valid and shall be *construed as provided in this act, and when any provision in a policy is in conflict with any provision of this act, the rights, duties and obligations of the company and policyholder and the beneficiary shall be governed by the provisions of this act.*"

Therefore the entire set up, from start to finish, was illegal. Nobody knew it better than the defendant companies. They were the moving spirits acting to set up such a scheme. The government, however, provided that it should be used in states prohibiting such things, but the defendant company proceeded to use it

anyhow, knowing without any question what it was doing. It is no wonder that the Court said "in a proper action it might be said that the war rating plan, on insurance involved in this action, as was written, was not permissible under the statutes of Idaho."

In other words, the Court has found definitely, in its opinion, that the plan could not be operated in Idaho and certainly, the defendant companies have endeavored, in our analysis, to evade the laws of the State of Idaho, coming in on the flimsy excuse that some years before they notified Ware they would pay him $5.00 for a small amount of counter-signing and when it was pleaded that this was out-of-state business not covered by his contract and when the testimony of Peterson shows that and they failed to produce the man who wrote the letter and testify otherwise, it should be taken as conclusive that that agreement has nothing to do with the case. If it is a fact and it was intended to act without commissions, then it is void as against public policy and should be disregarded.

With this out of the order to the findings of the Court, which is unquestionably the rule that this policy was not permitted, then this company which has gone to all of the pains it has getting the plan set up to evade the laws of the United States and of the State of Idaho, should be required to pay the commissions provided for by law on the full standard premium covered by the policy.

With all the numerous decisions, including that of *Osburn v. Ozlin* and of *Homes v. Insurance Company* and of all the later cases, they were fully advised what the courts had held, neither they nor anyone else was justified to try to set up a scheme to evade the laws and escape the payment which the law requires them to make if they are to carry on in Idaho.

RETROSPECTIVE RATING

Something has been said about Retrospective Rating being new. Of course, that is not the fact. Retrospective or rating based upon what actually happened on a certain job is almost as old as the insurance itself. In fact, it is so well known that apparently the learned Judge who originally decided *Osborn v. Ozlin* took judicial notice of it and had no difficulty in holding that very often it was used simply as a method in evading the statute.

Osborn v. Ozlin 29 Fed. Supp. 71 on page 76, he said:

> "The controlling reason, however, for the out-of-state production of hotchpotch of master policies covering persons or property in Virginia is the lower rate obtained for Virginia risks. *This result is accomplished by some form of special rating,* e. g. 'retrospective rating,' whereby the premium is retroactively reduced or increased, according to the favorable or unfavorable experience of the risk, 'experience rating,' which is based upon the application of an inflexible formula to the history of the losses of the assured, or 'equity rating,' which involves some flexibility of judgment in the formulation of rates lower than those developed by a fixed formula, and usually includes some reduction in the amount of the producer's commission. Reduction in the cost of the insurance of a large corporation is sometimes secured by inviting the brokers to make competitive bids. The broker usually gets the business who offers the best price, *and he frequently contributes to this result by reducing the customary commission.*"

We think nothing could be more fitting to the case at bar than this, as here they attempt to avoid the satutes of the State of Idaho requiring the payment of commission entirely, by simply annulling commission after having appointed Ware the agent to countersign these policies, and reading the statute into them, agreeing to pay him 10% on workmen's compensation —*and the contract at no time or place provides any other or different rate of commission on workmen's compensation than* 10%.

The reading of the decision by the Trial Judge of *Osborn v. Ozlin* is very illuminating as showing that the same type of contention was back of all of that case as involved here. The learned Trial Judge found in substance, that all of these matters were nothing but schemes to evade the law and that they were not valid.

STATUTE ENACTED FOR BENEFIT OF CLASS GIVES CAUSE OF ACTION FOR FAILURE TO COMPLY THEREWITH

In this case the statute providing for full commissions to the counter-signing agent was for his benefit as well as a protection to the public, and gives him the right to maintain an action thereon.

Willy v. Mulledy, 34 Am. Rep. 536, was where the statute required fire escapes. The tenant brought the action. The Court said:

> "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

Wolf v. Smith, 9 L. R. A. (N. S.) 338 is a brief on this question and directly in point. No remedy was provided but the Court said:

> "Neither does the statute provide a remedy for a failure to comply with its terms, *but this presents no obstacle to recovery in a proper case against the wrongdoer.* The common law affords the remedy, and, if the plaintiff has a cause of action, the proper remedy has been resorted to in this instance."

Queen v. Dayton Coal & Iron Co., 30 L. R. A. 82, where the Court said:

> "The requirement of fire escapes was for the direct and special benefit of the operators in such

factories, and intended for their protection *and the rule applies that when a statute commands or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for a wrong done to him contrary to its terms.*"

The following cases fully sustain the rule:

Williams v. Travelers Ins. Co. 169 N. W. 609;
Credit Men's Adjustment Co. v. Vickery, 161 Pac. 297;

Great Western Mach. Co. v. Smith, 124 Pac. 414;

First National Bank v. Weidenbeck, 97 Fed. 863, C. C. A.;

Davis v. Mills, 99 Fed. 39;

Huntington v. Atrill, 146 U. S. 676, 36 L. Ed. 1131;

Robinson v. Harmon, 122 N. W. 106.

If this was not true then the Courts have been deciding most questions and all of the cases requiring the statutes complied with and the commissions paid were rendered under a mistake. It would have been idle in *Osborn v. Ozlin* for the Supreme Court to hold that commission had to be paid if the party entitled to the commission could not collect it.

The Court was doing a futile thing in *Holmes v. Insurance Co.* in sustaining the Attorney General's position that the full commission meant the amount

the agent would have secured had he himself written the policy, and the decision was hollow mockery if the agent could not collect. The whole theory of the law is that the agent has that full commission coming to him and is entitled to it, and being so, the statute was designed for his protection and his benefit and he is entitled to enforce it.

Most of the questions involved in this appeal are so closely connected that it is hard to draw a definite line where the argument and law on one ceases and another commences, as most of them are dependant on each other. The principal points decided by the Court are that the letter written to Ware to pay him $5.00 per month for a small amount of counter-signing, evades the public policy of Idaho and although illegal, as construed by Defendants, can be set up by them as a defense, although Ware never received any sum from them whatever after the policies were signed and that the statute is void and a nullity because the term full commission does not mean anything and gives no basis for recovery.

In conclusion we respectfully submit:

I.

That the letter Defendants' Exhibit 1 to Answer and Exhibit 7 in Evidence, does not apply to anything in this case. It refers only to a small amount of counter-signing, which we alleged in our reply, Par. III, P. 53 and 54, and the Defendants witness Peterson

testified too, was, out-of-state business P. 164. If construed in the manner now contended for by Defendants it would mean it was a subterfuge to evade and set aside the public policy of the State of Idaho and under the decision of the trial judge the agency contracts "become public policies of the State and *cannot be departed from by the parties.* I agree that *they cannot be waived, and that the public policies cannot be departed from.*"

This being so, the Defendant cannot set up this alleged agreement as a defense or rely thereon again. Ware is dead, and they had a witness who wrote this very ambiguous letter and did not produce him or elucidate any explanation from him in regard thereto. Being ambiguous, and a unilateral writing, and not a negotiated contract, it will be construed strictly against the Defendants as they drew it. Certainly under these rules they cannot under any circumstances be heard to ask such a construction, and if it is so construed it makes the agreement illegal and void, and it being a special defense brought into the case by them, they cannot use the same for any purpose, much less a defense in this case.

II.

As to the notice sent out by the Defendants, Exhibit A2 to the Complaint, it is clear that the sentence, "*on risks or portions of risks which are in states other* than that indicated in the territory described in your Agency Agreement," was written because of the then recently

decided case of *Osborn v. Ozlin* holding that the counter-signing agent was entitled to his commission, and sustaining state statutes so providing, in a sweeping way, would require the Defendants to pay a double commission, and this is also amplified by the fact that it also provides, "and on Bonds *involving execution or counter-signature by another agent,*" shows beyond a doubt that it was intended to protect themselves against this contingency and nothing else. If this was not its purpose, then these sentences in the notice were worse than useless. It again comes under the same rule of construction as the former letter just referred to, and under no reasonable construction can be held to apply otherwise than as contended for by the Plaintiff.

III.

As to the term "full commission," it is clear that what the legislature had in mind was that the agent got all the commission without reduction of any kind. The legislatures of half a dozen states having used the same term, it would seem to be rather presumptuous to say they did not know what it meant. The witness, Nelson, an experienced insurance agent, testified what it meant, and there was no dispute on that. But that is not all. The Attorney General of Montana rendered his opinion that it means exactly what we claim. The insurance company set up his opinion in full in their petition to enjoin the Auditor from enforcing it; that is it gave no right and was so indefinite it could not be enforced. The case went to the United States Supreme Court and they had no difficulty in understand-

ing it, and reversed the decision of a three-judge court holding in favor of the Insurance Company. On the first appeal in this case, if that statute did not give a measure for relief, we had no case and this Court must have held that it did, as counsel for appellee devoted many pages of their brief (pages 23 to 27) so contending, but this Court sustained the Complaint. The Court in his opinion admits the statute should be read into the contract. If such is done, the contract provides Ware was to get 10% on Workmen's Compensation cases which establishes the "full commission." The contract further provides Ware was to countersign policies for Defendants; Par. 8 P. 19. Now making the statute a part of that contract to countersign, it makes the provision that in Idaho policies, and those placed or written in Idaho, Ware was to get the "full commission." We think this is clear and as the Supreme Court of the United States undoubtedly took this position in *Holmes v. Springfield Ins. Co.* it would seem nothing further could be or is needed to be said on the question.

IV.

The so-called War Rating Plan was by its very terms, as well as the law of Idaho, not permitted in this State. The plan provides in substance that where it is not permitted, by the laws of a state, it shall not be used. The plan was built on the proposition that no agents' commission should be paid. The Idaho statute provides all policies on persons or property in Idaho shall be countersigned by an Idaho agent, and the full

commission paid to him, so therefore the plan was prohibited by the Idaho statute, and the trial Judge in substance so found. P. 75:

> "In a proper action it might be said that the war rating plan, under which the insurance involved in this action was written, was not permissible under the Statute of Idaho."

Again P. 86, last part of Findings VI, it says:

> "The Court makes no finding as to whether this plan was permissible under the laws of the State of Idaho."

But that is not all. Peterson, the secretary of the defendants testified he helped set up the plan, with some four or five other large insurance firms, and that the object of the plan was to get away from or evade the law of Congress, which requires the letting of the matter to the lowest bidder. We suppose he referred to Sec. 5, Title 41; Sec. 1333, Title 10; and Secs. 561-571, Title 34, all U. S. C. A.

And then again, the policy itself did not mention this so-called War Rating Plan and had nothing on it referring to any such endorsement. The plan provided for eliminating commissions to get the business and rebating a large portion of the premiums. This is strictly prohibited by the laws of Idaho and such a policy is void under the statute of this state under such circumstances, and then it is construed as to all parties according to the statute without regard to the policy contract, so from the start this policy and all the ac-

tions of the Defendants have been one continuous scheme and attempt to evade and avoid the statutes of Idaho. When public policy of the State of Idaho is provided for its statutes and the Defendants attempt to construe a contract so as to nullify, it is illegal and void. Further than that, they wrote these unilateral notices, did not produce the witness who wrote it, and the rule of construction is that it will be construed against them not only as to it being the person who failed to put what they claim the writing was intended to mean in the writing, but they failed to produce the witness who could have explained it and, being worse than ambiguous, if construed the way they contend for they will not be given the benefit of the doubt, but it will be resolved in favor of the appellants.

V.

The statute having been enacted for the purpose of compelling payment of the premiums to the agent who countersigns the policy on property, persons and risks within the State, will be construed by the Court to carry out this intention and having been enacted for the benefit of counter-signing agents they are entitled to base their action thereon and recover in accordance therewith.

In conclusion we respectfully submit that whatever difficulty the Defendants have gotten themselves into in this case, it has been of their own making in attempting to circumvent the statutes of the United States in attempting to nullify a statute of the State of Idaho

and as to their condition, the Court will leave them where it finds them and as the Plaintiff has been in no manner responsible for any of these acts, it should be given the benefit of the doubt enacted for their benefit and the Judgment of the Lower Court should be reversed.

Respectfully submitted,

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